SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 190.

THE SOUTHERN PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,

AGAINST

THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLANTS.

Statement.

By the ninth section of the Act of Congress, approved March 3, 1871, and entitled "An Act to Incorporate the Texas Pacific Railroad Company, and to Aid in the Construction of Its

Road, and for Other Purposes" (16 U. S. Stat., 573), a grant of land was given to the Texas Pacific Railroad Company to aid in the construction of a line of railroad from a point at or near Marshall, County of Harrison, State of Texas, to San Diego, in the State of California (Appendix, p. V).

By the twenty-third section of the Texas Pacific Act above referred to a grant of land was given to the Southern Pacific Railroad Company of California, commonly known as the "Branch Line Grant," to aid in the construction of a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River (Appendix, p. XII). This grant to the Southern Pacific Railroad Company was upon the same terms and conditions as the grant to said railroad company under the eighteenth section of the Atlantic and Pacific Act, approved July 27, 1866 (14 U. S. Stat., 292).

Inasmuch as the proposed railroad, which was to be aided by the grant under section twenty-three of the Texas Pacific Act, would cross the grant to the Atlantic and Pacific Railroad Company, under the prior Act of 1866, a provision was inserted in the twenty-third section of the

Texas Pacific Act, by which it was provided that the grant thereunder to the Southern Pacific Railroad Company should not in any way "affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

The grant to the Southern Pacific Railroad Company under the Texas Pacific Act was subject to the terms and conditions of the third section of the Atlantic and Pacific Act (Appendix, p. XIII), which prescribed in a State primary or granted limits, ten alternate sections in width, on each side of the railroad line adopted by the company, and indemnity limits extending ten miles beyond such primary limits.

The Texas Pacific Railroad Company did not file any map of definite location and never built any part of its proposed line of railroad in the State of California, and all lands and rights to lands granted to and conferred upon said railroad company by the Act of March 3, 1871, and situated within the State of California, were forfeited to and resumed by the United States and were restored to the public domain by an Act of Congress, approved February 28, 1885 (23 U. S. Stat., 337; Appendix, p. XV).

After the Texas Pacific Forfeiture Act the Southern Pacific Railroad Company claimed that it was entitled to the lands common to the two contemporaneous grants to the Texas Pacific Railroad Company and to the Southern Pacific Railroad Company under the Act of 1871. It was further claimed by the Southern Pacific Railroad Company that it was entitled to select, in lieu of lands within the primary limits of its grant under the Act of 1871, any of the lands which had been restored by such Forfeiture Act to the public domain upon the principle that the right of the grantee in respect of indemnity lands depended entirely upon the status of such land at the date of selection.

Thereupon and on January 31, 1894, the United States filed in the United States Circuit Court for the Southern District of California the bill of complaint in this suit against the Southern Pacific Railroad Company, and other defendants, seeking to quiet the title of the United States to the lands restored to the public domain by the Texas Pacific Forfeiture Act, and to restrain the Southern Pacific Railroad Company from making any claim thereto (Record, p. 4). Thereafter, and on October 11, 1894, an

amended bill of complaint was filed herein, and the lands referred to in said amended bill of complaint are the sections of land in the State of California designated by odd numbers, within forty miles of the line of route of said Texas Pacific Railroad Company, as shown by the map filed by said company in the General Land Office, to which the Southern Pacific Railroad Company has made any claim under the grant to it by the provisions of the twenty-third section of the Act of March 3, 1871, and the prayer of the amended bill is "that the defendants be perpetually enjoined from having or claiming any right, title or interest in or to said lands from, through or under said Acts of Congress, approved July 27, 1866, or March 3, 1871, or joint resolution of Congress approved June 28, 1870 (Volume 16, U. S. Statutes, p. 382), or any other Act of Congress named or to be named in this bill" (Record, p. 53).

On the 3d day of March, 1898, this cause came on for trial before the Honorable ERSKINE M. ROSS, and on the 24th day of August, 1899, a final decree was entered in the cause enjoining and restraining the Southern Pacific Railroad Company and the other defendants therein from

having or claiming any right, title or interest or incumbrance in, upon, or to, all of the sections and parts of sections of lands in the State of California, surveyed and unsurveyed, designated by odd numbers within 20 miles on each side of the line of route of the Texas Pacific Railroad Company from a point near Marshall, in the State of Texas, westerly to the Bay of San Diego (Record, p. 775). As to the remainder of the lands described in the bill of complaint, it was ordered that the bill of complaint be dismissed, and that the complainant take nothing (Record, pp. 776 and 792).

In his opinion, Judge Ross does not discuss the question of the title of the lands involved upon this appeal, but simply holds that the whole subject has been heretofore disposed of by the decision of this Court in the case of United States vs. Colton Marble & Lime Company, 146 U. S., 615. He says as follows (Record, pp. 818, 819 and 820):

> "As the grants to the Southern Pacific and the Texas Pacific Railroad Companies were made by the same act and of the same date, the usual rule would give to each company one-half of such lands as fell within

both grants. But the present case is taken out of the ordinary rule, as was expressly decided by the Supreme Court in the case of United States v. Colton Marble & Lime Co., 146 U. S. 615, 616, by the proviso annexed to the grant to the Southern Pacific Company; respecting which proviso the Supreme Court, in the case last cited, said: 'It cannot be supposed that this proviso was meaningless, and that Congress intended nothing by it. Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that Congress meant by it to impose limitations and restrictions different from those generally imposed in such cases, and it in substance declared that the Southern Pacific Company should not in any event take lands to which any other company had at the time a present or prospective right.' * * *

"The Court was here speaking of the conflicting claims of the Southern Pacific and Atlantic & Pacific Railroad Companies, but, as the proviso to the Southern Pacific grant also includes the 'present or prospective' rights of 'any other railroad company,' it is obvious that the decision of the Supreme Court in the case cited is equally applicable to the conflicting claims of the

Southern Pacific and Texas & Pacific Companies, and that, under that decision, any lands to which the Texas & Pacific Company had a present or prospective right at the time of the filing in the general land-office by the Southern Pacific Company of its map of the definite location of the road it was authorized to build by Section 23 of the act of March 3, 1871, were excluded from the grant thereby made. And as whatever rights the Texas & Pacific Company ever acquired to any of the lands in question continued to exist until the act of forfeiture passed by Congress, February 28, 1885, and as long before that time the Southern Pacific Company had built the road it was authorized to construct, and filed in the general land office maps showing its definite location, it follows that if, at the latter date, the lands in suit, or any of them, were for any reason reserved, or were lands to which the Texas & Pacific Company had acquired a present or prospective right, such lands did not pass to the Southern Pacific Company under its grant.

"The case shows that the Texas & Pacific Railroad Company filed in the office of the secretary of the interior a map of the general route of its road on the 15th day of October,

1871, which map was accepted and approved by the secretary of the interior, and that thereupon an executive order was made withdrawing, for the benefit of that company, all of the public lands in California, designated by odd numbers, falling within 20 miles on either side of that line of its road. To all of such public lands the Texas & Pacific Company certainly had a 'prospective,' if not a 'present,' right, under the decision of the Supreme Court in United States v. Colton Marble & Lime Company, *supra*."

From the final decree entered on August 24, 1899, an appeal was taken by the Southern Pacific Railroad Company, and its co-defendants, to the United States Circuit Court of Appeals for the Ninth Circuit (Record, p. 2423), and it was assigned as error that the Court below erred in deciding that the United States was the owner by title in fee simple absolute, or the owner in any wise of the lands, or any part thereof described in the first sub-division of said decree (Record, p. 2444). The United States took a cross-appeal from said final decree other than the first sub-division thereof (Record, 2444). On the 20th day of May, 1901, a decree was entered in said Court affirming the decree below (Record, p. 2469).

From the decree of said Court of Appeals for the Ninth Circuit the present appeal to this Court has been taken (Record, p. 2471). No cross-appeal in this case has been taken by the Government, and the time for taking any cross-appeal has expired.

Specification of Errors.

The Circuit Court of Appeals erred:

I. In not reversing the decree of the Circuit Court made and entered herein on August 24, 1899, and directing the said Court to render a decree dismissing the bill of the United States, as to the lands described in the first subdivision of the final decree herein, as follows: All of the sections and parts of sections of land in the State of California, surveyed and unsurveyed, designated by odd numbers within twenty miles on each side of the line of route of the Texas Pacific Railroad Company, from a point near Marshall, in the State of Texas, westerly to the bay of San Diego, in so far as said lands or any part thereof are situated within thirty miles on either side of the designated line of road of the Southern Pacific Railroad Company between the

Colorado River and a point near Fort Yuma and Los Angeles.

II. In deciding that the United States are the owners by title and fee simple absolute, or the owners in any wise, of the lands or any of them, in controversy and described in the pleadings and in the first subdivision of the decree of the Circuit Court herein.

III. In deciding that the defendants and appellants, each of them, be enjoined and restrained from having or claiming any right, title, interest or lien in or to the lands or any of them in controversy and described in the pleadings, and in the first subdivision of the decree of said Circuit Court herein.

IV. In deciding that the defendants and appellants were not entitled to all the lands in controversy which are common to the place limits of the grant to the Texas Pacific Railroad Company and the place limits of the grant to the Southern Pacific Railroad Company under the contemporaneous grants to the two companies by the Act of Congress approved March 3, 1871, and entitled "An Act to Incorporate the Texas and Pacific Railroad Company and to

Aid in the Construction of Its Road, and for Other Purposes."

V. In deciding that the defendants and appellants were not entitled to an undivided half of the lands common to the place limits of the grants to the Texas Pacific Railroad Company and the Southern Pacific Railroad Company under the Act of Congress approved March 3, 1871.

VI. In deciding that the defendants and appellants are not entitled to select lands within the indemnity limits of the grant to the Southern Pacific Railroad Company, notwithstanding that such lands had formerly been within the place limits of the grant to the Texas Pacific Railroad Company.

FIRST POINT.

The Southern Pacific Railroad Company is entitled to all the lands common to its place limits and the twenty-mile limit shown on the Texas Pacific map of general route of August 15, 1871.

The grants to both the Texas Pacific Railroad and the Southern Pacific Railroad were given by the Act of 1871 (Appendix, p. 1). The grant to

the latter company was by the 23d section of the act and contained the following proviso:

> "That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

Nothing was done by the Texas Pacific in relation to its proposed road in California, except to file in the Interior Department in October, 1871, a map of general route (Record, p. 8). No map of definite location was ever filed by it and not a mile of railroad ever constructed. After the filing of this map of general route and on or about October 15, 1871, the usual order of withdrawal from "pre-emption, private entry and sale" of all public lands within the limits of the Texas Pacific grant was made by the Commissioner of the General Land Office (Record, p. 8).

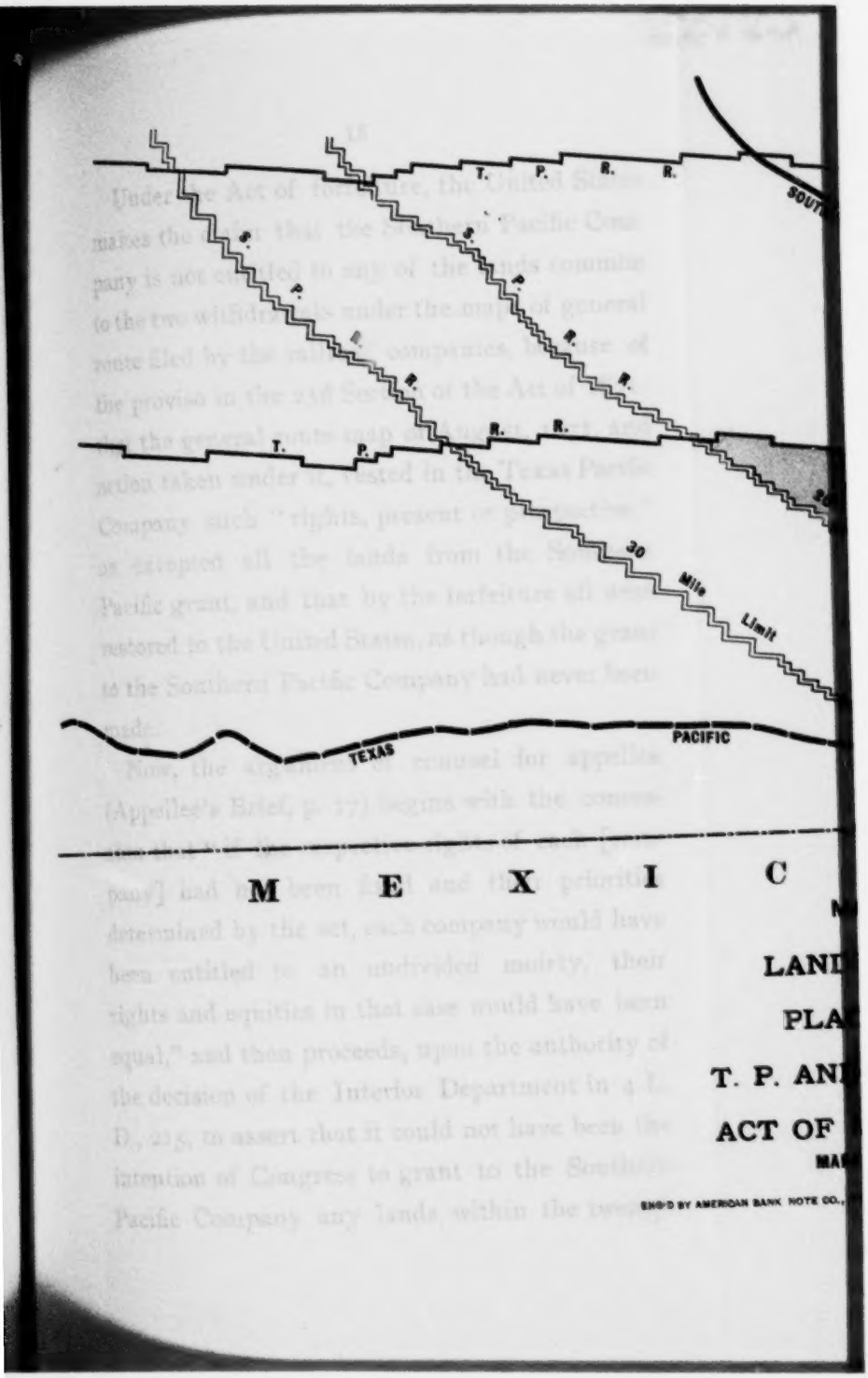
The Southern Pacific Company, on April 3, 1871, filed its map of general route from Yuma, North, and on April 21, 1871, the lands within its limits—including all the lands in suit—were withdrawn from "pre-emption, private entry and sale" by the Commissioner of the General Land Office (Record, p. 63). This withdrawal on the Southern Pacific map was thus more than five

months before the withdrawal on the Texas Pacific map. The lands in controversy under this point are shown in red upon Map 1.

The Southern Pacific then proceeded with its construction upon the line of its map of 1871 from Tehachapa Pass (where it connected with its main line road from the Needles to San Francisco) to Yuma. The line was completely constructed and accepted by the United States, the last section being finished in December, 1877 (Record, p. 63).

We have, therefore, a completed, accepted line of road built under the grant, and its benefits claimed by the Southern Pacific Company, as against a mere map of general route filed by the Texas Pacific Company, and a withdrawal of lands from "pre-emption, private entry or sale," which was subsequent to the withdrawal in favor of the Southern Pacific Company.

Nothing whatever having been done by the Texas Pacific Company toward locating or building the road, Congress, in February, 1885, forfeited the grant to that Company (see appendix, p. xv). This forfeiture covered the proposed lines of the Texas Pacific Company in Arizona, New Mexico and California.


T. P. R. R.
T. P. R. R.
30 Mile Limit
TEXAS
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MAP No. 1.

LANDS COMMON TO PLACE LIMITS OF T. P. AND S. P. GRANTS, UNDER ACT OF MARCH 3d, 1871, MARKED IN RED.

ENG'D BY AMERICAN BANK NOTE CO., NEW YORK.

Scale, One Inch — 12 Miles.

Under the Act of forfeiture, the United States makes the claim that the Southern Pacific Company is not entitled to any of the lands common to the two withdrawals under the maps of general route filed by the railroad companies, because of the proviso in the 23d Section of the Act of 1871: that the general route map of August, 1871, and action taken under it, vested in the Texas Pacific Company such "rights, present or prospective," as excepted all the lands from the Southern Pacific grant, and that by the forfeiture all were restored to the United States, as though the grant to the Southern Pacific Company had never been made.

Now, the argument of counsel for appellee (Appellee's Brief, p. 17) begins with the concession that "if the respective rights of each [company] had not been fixed and their priorities determined by the act, each company would have been entitled to an undivided moiety, their rights and equities in that case would have been equal," and then proceeds, upon the authority of the decision of the Interior Department in 4 L. D., 215, to assert that it could not have been the intention of Congress to grant to the Southern Pacific Company any lands within the twenty-

mile limits of the Texas Pacific general route map. We submit that every principle of law governing this case has become so well settled that citation of authority only is necessary, and we respectfully insist that the Southern Pacific Company is entitled to all the lands common to its place limits and the twenty-mile limits shown by the map of withdrawal on the Texas Pacific map of general route of August 1871.

The terms of the Act of 1871 and the map of April, 1871, followed by construction of the road and acceptance by the government, gave these lands to the Southern Pacific Company, unless,

First. By a definite location of its line, the grant to the Texas Pacific *took effect*, so that it became, by operation of the law as to contemporaneous grants, entitled to an undivided half of the odd sections of the overlapping limits, or

Second. Unless the proviso in Section 23 defeats the Southern Pacific claim (the Texas Pacific Company having done nothing beyond filing its map of general route).

As to the first condition the grant to the Texas Pacific never "took effect" as to these lands.

Nothing is better settled in the land laws,

than that, while a congressional land grant to a railroad company, is a grant *in præsenti*, until acceptance by the company and the filing of a map of definite location of line, fixing the route of the road beyond the power of the company to change it without express authority by Congress so to do, the so-called grant is, in the language of the decisions, only a "float," and that it does not vest the company with any right or interest in any specific tract of land.

In Van Wyck vs. Knevals, 106 U. S. 360, 365, the situation of a grantee and the fact that the grant is not only not self operating, but can have no practical operation until the line or road is definitely located, is concisely stated as follows:

> "The grant is one *in præsenti*, * * * that is, it imports the transfer, * * * of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are *incapable of identification* until the route of the road is 'definitely fixed.' When that route is *thus established*, the grant *takes effect* upon the sections by relation as of the date of the act of Congress."

The strict application of this rule has been

consistently observed in the judicial decisions of this Court. The grant resting in the statute does not "take effect" until "definite location" by map duly filed, and not an acre of land, to pass by the grant, is "capable of identification," until the route of the road is so fixed.

We call attention to the words "takes effect," so commonly used by this Court in defining the operations and rights under these grants. It is practically the unvaried expression, that, until definite location, the grant does not "take effect."

The *act* which fixes the *time* of the definite location is the act of filing the map in the office of the Commissioner of the General Land Office, as was decided in the case of Kansas Pacific Ry. Co. vs. Dunmeyer, 113 U. S., 629.

Therefore, the "grant" to the Texas Pacific never "took effect" as to any of these lands. It was a "float" of benefit only when the company should act, by "locating" its line, and *so* causing the grant to "attach" to specific tracts of land. To state it broadly, there has never been a time when it could properly be said that the Texas Pacific Company had an interest in, or that its grant took effect upon an acre of land in this controversy.

No application can be made here of the law of contemporaneous grants to the effect that lands common to the place limits of the two grants must be shared equally between the grantees, because such rule of law presupposes that both companies have vested rights in the common land acquired by each having filed a map of definite location. That is to say, when grants have been made by the same act or at the same time affecting the same lands and such action has been taken by the railroad companies that legal rights to specific lands have attached, then the Court has been called upon to determine the rights between them and has given to each an undivided moiety in the lands. *It is, however, to be noticed that invariably in every such case there has been a definite location of its line of road by each company.*

The rule of construction as to contemporaneous grants is stated with clearness in Sioux City & St. Paul R. R. Co. vs. The United States, 159 U. S., 349–364.

> "The rule is well settled that when lands are granted by Acts of Congress of the same date, or by the same Act to aid in the construction of two railroads that must neces-

> sarily intersect, or which are required to intersect, each grantee—*the map of definite location having been filed and accepted*—takes, as of the date of the grant, an equal undivided moiety of the lands within the conflicting place limits, without regard to the time of the location of the respective lines."

While the grant is only a "float" till definite location, then upon such location (as is perfectly well understood) the fiction of "relation" is brought in and the right to the land relates back to the date of the grant.

In Sioux City & St. P. R.R. Co. vs. C. M. & St. P. R'y. Co., 117 U. S., 406, 408 as to contemporaneous grants, it was said:

> "The title acquired from the United States relates back to the date of the grant, and neither company can obtain any superiority of title by any act done by it or by any omission to act by the other, *provided there is no forfeiture of the grant.* This principle is fully decided in the case of Sioux City & St. Paul R.R. Co. vs. Winona, &c. R.R. Co., 112 U. S., 720. *In such cases* the companies take the lands coming within the *conflicting lines* in equal undivided moieties."

In the case at bar there was a forfeiture by

Act of Congress, and of course as to the Texas Pacific, there is nothing to construe as to rights in specific lands, as it never had any, because of its failure to file its map of definite location.

It is obvious that there can be no "conflicting lines," except upon maps of location of road, and within lateral limits drawn with relation thereto. As said by Mr. Justice MILLER in the case last cited, when speaking of the map of definite location at page 408 "that *location* ascertained the sections which passed by the grant, and fixed the right to such sections, whether it was the whole or the moiety of them."

Put in another way, there can be no "crossing" or "conflict," or "overlapping" of grants, calling for construction of the laws making them except there be maps of location, fixing "lines" and "limits." Therefore in every case in this Court, where construction has been given to contemporaneous grants, there was definite location by all the companies interested.

Although the Act of 1871 contemplated aid to the two railroads, the rights of neither could be foreseen by Congress, except in the most general way, so long as the lines of route were optional with the Companies. While Yuma was settled

upon as the junction, no one could say, in advance, whether there would be any conflict in the grants. If the topography was such at the junction that it would be better for the Texas Pacific line to go south for a distance, and for the line of the Southern Pacific Company to go north toward San Francisco, there would be no conflict at all.

The case, therefore, stands upon recognized rules of construction, and each railroad is entitled to receive what it has earned under the grant. If the Texas Pacific Company located and constructed its line of road, and the Southern Pacific Company abandoned its contemplated road and its lands were forfeited, clearly the Texas Pacific would receive all the land within its place limits. Conversely, the Southern Pacific Company is now entitled to all, unless defeated by the proviso to the 23d Section of the Act of 1866, to be considered later.

Under the established rule of this Court, where valid acts of Congress make grants at different times to different companies embracing the same lands, the courts are to determine which shall take the lands.

In the case of the United States vs. Oregon, &c. Railroad Co., 176 U. S., 28, the lands in suit

were within the probable limits of the Northern Pacific grant of 1864, and within the legislative withdrawal, if such obtained, upon its map of general route of March, 1865. The lands were also within the grant to the Oregon and California Railroad Company under the Act of 1866 and within the limits fixed by the map of definite location filed October 29, 1869.

Here was legislation, or "grant," coupled with general route map, to the Northern Pacific Company long prior to legislation, or "grant," and map of the Oregon and California Company, covering the same lands. Because of the failure of the Northern Pacific Company to take the necessary action to make its floating "grant" attach to the lands, viz., by filing a map of definite location of its line, and because there was a forfeiture of its grant by Congress, the Oregon and California was held entitled to the lands.

Again, in the case of the United States vs. Southern Pacific R. R. Co., 146, U. S. 570, the lands were within the probable limits of the Atlantic and Pacific grant. They were also within the limits of the later Southern Pacific grant (in fact, the very grant in this case). The Court, considering what would have been

the effect had the Atlantic and Pacific map been a general route map instead of a map of definite location (as it was held to have been) at page 606 said:

> "The question is asked, supposing the Atlantic and Pacific Company had never located its line west of the Colorado River, would not these lands have passed to the Southern Pacific Company under its grant? *Very likely that may be so.* The language of the Southern Pacific Company's grant is broad enough to include all land along its line, and if the grant to the Atlantic and Pacific Company had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Company."

The exact relation of two companies toward the lands which are embraced in contemporaneous grants, where there is action toward construction by one, and non-action by the other, is well and authoritatively illustrated by the letter of Mr. Secretary Lamar, quoted approvingly by this Court in S. P. R. R. Co. vs. United States, 183 U. S., 519, as follows at page 525:

> "The question as to the two grants under this Act of 1866, was presented to Mr.

Justice LAMAR, at that time Secretary of the Interior; and his ruling to the same effect appears in a letter of instructions to the acting Commissioner of the General Land Office on November 25, 1887. 6, Land Dec., 349. In that letter he said:

"'The Southern Pacific Company located its main line January 3, 1867, and by the terms of the grant, its right immediately attached to every odd section of land not of the character excepted by the grant, and within the ten-mile limit, subject, however, to be divested to the extent of a half interest in every such odd section that might fall within the common limits of both roads, *after the filing of the map of definite location by the Atlantic and Pacific Company.*

"'The Atlantic and Pacific Company filed its map of definite location April 11, 1872, and April 16, 1874, showing that the primary or granted limits of said road overlapped and conflicted with the primary or granted limits of a portion of the Southern Pacific road. As to the lands falling within the granted limits of both roads, the filing of the map of definite location by the Atlantic and Pacific Company, showing such conflict, immediately divested the Southern Pacific Company of the right and title to a half

> interest in all such odd sections, and from that moment *and by that act the two companies* became entitled to equal, undivided moeities in such sections, without regard to the priority of location of the line of the road, or priority of construction; the right of each company relating back to the date of the grant.'"

As to whether the Southern Pacific map was of general route or definite location, Mr. Justice BREWER, in the same opinion, said at p. 526:

> "Neither is it material whether the line indicated on the map filed is to be taken as a line of general route or of definite location, for in fact the road was constructed along that line 'as near as may be,' in the language of the resolution, and the road has been accepted by the Government."

After concluding the quotation of Mr. Secretary LAMAR'S opinion, this Court said, at p. 527:

> "We are of the opinion, therefore, that Mr. Secretary Lamar was right in his conclusion that both the grant to the Southern Pacific and that to the Atlantic and Pacific *took effect*, and being by the same act, so far as there was a conflict, the two com-

panies took equal, undivided moieties of the land."

That is to say, the Southern Pacific Company had the undoubted right to proceed with definite location and construction, and by so doing to become vested under the terms of the grant with the title to all lands within its place limits until, by due *location of line*, the Atlantic and Pacific became entitled to be treated as a tenant in common.

The argument of the appellee that these lands were "reserved" by reason of the withdrawal in September, 1871, on the Texas Pacific map of general route, would seem to be disposed of by the statement that when the withdrawal was made for the Texas Pacific Company all the lands had been since the previous April under withdrawal on the Southern Pacific map of general route.

The grants to both roads, whatever they were, were by the same Act of Congress, and as to rights under the legislation, under general law, neither could have a withdrawal to the disadvantage of the other. Otherwise the Southern Pacific withdrawal would oust the Texas with-

drawal because the earlier. We think it perfectly clear that these "withdrawals" were neither of advantage or prejudice to either company, upon the theory of "reserved lands."

It remains then to consider the proviso of the 23d section of the Act, that "this section shall in no way affect or impair the rights, present or prospective of the Atlantic and Pacific Railroad Company or any other railroad company."

Assuming for the purpose of the argument only, that the Texas Pacific Company may be included in the expression, "or any other railroad company," what "rights" were prospectively safeguarded by the *proviso?* These could only be rights to tracts or specific parcels of lands in either primary or indemnity limits, and these of necessity must be along and opposite a located line. A right is defined to be, that which justly belongs to one; that one has a claim to posses or own: title; claim; property; interest; ownership.

There being no located line of the Texas Pacific, no "present rights" of said company ever attached to any tracts of land as "place" lands; the only "present" right which could attach to place lands would be *title* itself thereto, which could only come through definite location.

Beyond question or claim even by counsel, the Texas Pacific Company never had a "present right" to an acre of these lands, and so no act of the Southern Pacific Company by way of location or construction has affected or impaired any "present right" of the Texas Pacific Company.

We are brought, then, to the other class of rights, viz., "prospective rights" to the lands in suit; the assumption is indulged in that, by recognition of the *prima facie* right of the Southern Pacific to its earned lands, a "prospective right" of the Texas Pacific was affected or impaired.

Now, a "right" to property must have some specific property to rest itself upon; a "present" right is an existing interest of some kind in the thing affected; a "prospective" right must be an appreciable claim based upon some reasonable expectation of acquiring the thing or property. As to railroad lands, no right, present or prospective, can possibly arise without location of line; when that shall have been done there is a *present* right as to place lands and a *prospective* right as to indemnity lands; but, until then, no rights of any kind exist as to specific lands.

This is the substance of the decision in the

United States vs. Colton Marble Co., 146 U. S., 615. After showing that this *proviso* had no relation to granted or place lands, as the filing of map of definite location would fix the present rights to such lands, the opinion proceeds, at page 617, as follows:

> "* * * Congress meant by it to impose limitations different from those generally imposed in such cases, and it in substance declared that the Southern Pacific Company should not in any event take lands to which any other company had *at the time* a present or prospective right. As it could have no effect upon the lands within the granted limits, it must have been intended to have some effect upon those within the *indemnity limits, they being the only lands upon which it could operate.*
>
> "What were the prospective rights of the Atlantic and Pacific Company? Of course it could not be known at the time of the passage of the latter act exactly where the lines of the two companies *would be located*, and where the point of crossing would be. Neither could it then be known that there would be any deficiency in the granted lands at the point of crossing, or that, if such deficiency existed, it would

require all the indemnity lands to make good the loss. It might well be assumed that very likely the Atlantic and Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency, in the granted limits. That right of selection was a prospective right, and if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits."

The opinion of the Court in the Colton case presupposes that a map of definite location was filed. Without the fixing of the place lands by the filing of the map of definite location, there could be no indemnity lands or any basis for the selection of them.

Nor did the map of general route change the situation, for a withdrawal by the Department on general route map gives no right, claim or interest in and to the lands covered by it. It simply protects the lands from the prohibited disposition to the public by pre-emption, private entry or sale.

Menotti vs. Dillon 167 U. S., 720.
Kansas Pacific Ry. Co. vs. Dunmeyer,
113 U. S., 636.

In the case of United States vs. Southern Pacific Ry. Co., 146 U. S., 570, it was said at page 600:

> "* * * the map which was filed on April 3, 1871, was simply one of general route, and therefore did not work a designation of the tracts of land to which the Southern Pacific's grant attached."

As to the effect of filing a general route map under a superior (prior) grant, where nothing else is done by the grantee, but a road is built by another grantee under a subsequent grant, followed by forfeiture of the superior grant, see the case of the United States vs. Oregon and California Rd. Co., 176 U. S., 28, in which it appears that the Northern Pacific grant was under the Act of July 2, 1864, and that the map of general route was filed March 6, 1865. The Northern Pacific grant was forfeited September 29, 1890, no map of definite location having been filed. The Oregon and California grant was under the Act of July 25, 1866, and its map of definite location was filed January 29, 1870, and its road constructed. In the opinion of the Court, at page 43, it is said:

"If therefore the Perham map of 1865 were conceded for the purposes of the present discussion to have been sufficient as a map of general route * * * these lands could not be regarded as having been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map, and before any definite location by the company of its line.

"There are some general expressions in Buttz vs. Northern Pacific Railroad, above cited, which, counsel insists, indicate a different view. In that case Mr. Justice FIELD said that when the general route of the Northern Pacific Railroad was fixed and information thereof given to the Land Department by filing the map of such route, '*the law* withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted.'

"This language was too broad, if it is

> construed to express the thought that public lands, when within the exterior lines of a 'general route' are 'appropriated' from the time the map of such route is filed, so as to prevent them from being granted by Congress to and from being earned by another railroad corporation prior to the filing of a map of definite location by the company designating such general route."

The effect of the Forfeiture Act of 1885 should perhaps be noticed, because under this Act the United States claims to have succeeded to the interests, whatever they were, of the Texas Pacific Company. Of course, by the Forfeiture Act, the Texas Pacific was divested of whatever it *had* under the Act.

As to all public lands in Arizona, New Mexico and California, which might have been earned by it, or to which title might have attached, had definite location of its line been made, its rights never progressed beyond the granting act, under which its right to the lands was only a "float." The Forfeiture Act, therefore, was simply a repealing act and nothing more. The United States was not by the Forfeiture Act re-

vested with any title to the land, for no *title* had as yet passed from it. The act simply revoked the right on the part of the Texas Pacific to take certain action by which tangible title might be secured.

The title to all public lands which the Texas Pacific might have obtained by filing its map of definite location, has all along been in the United States (except in so far as title to a part thereof has been acquired by the Southern Pacific Company), undisturbed by the Texas Pacific grant, so that no title to any land to be quieted by this bill has reverted to the United States by reason of the Texas Pacific Forfeiture Act. The Southern Pacific claims to the lands in question, which are attacked in this suit, are regular claims of title to lands earned by construction and acceptance of its road under the grant.

We therefore submit that the Southern Pacific Railroad Company is entitled to all lands common to the place limits of its grant and the grant to the Texas Pacific Railroad under the Act of March 3, 1871, and that the United States acquired no title thereto or interest therein or in any part thereof by reason of the Forfeiture Act of 1885.

SECOND POINT.

The Southern Pacific Railroad Company is entitled to an undivided half of the lands common to its place limits and the place limits of the grant to the Texas Pacific Railroad Company under the Act of March 3, 1871.

If the Court should not agree with the contention in the first point that the appellant was entitled to all the land common to the place limits of the two roads, because of the failure of the Texas Pacific to file a map of definite location, then we insist that the Southern Pacific is entitled to one-half the land within the conflicting limits.

The grants to the Southern Pacific Railroad Company and to the Texas Pacific Railroad Company under the Act of 1866 were, of course, contemporaneous grants, and it is well established by the decisions of this Court that, where two railroads receive grants under the same act, they share in common all conflicting lands within their place limits. The lands involved under this point are an undivided half of lands shown in red upon Map 1.

The latest case upon this subject is the

Southern Pacific Railroad Company vs. United States, 183 U. S., 519, where it was said at page 525:

> "By the act of 1866, Congress made grants of land to two different companies; by the third section to the Atlantic and Pacific, and by the eighteenth section to the Southern Pacific. The settled rule of construction is that where by the same act, or by acts of the same date, grants of land are made to two separate companies, in so far as the limits of their grants conflict by crossing or lapping, each company takes an equal, undivided moiety of the lands within the conflict."

The following cases are to the same effect:

> Sioux City, &c., Railroad vs. United States, 159 U. S., 349.
> Donahue vs. Lake Superior Canal, &c., 155 U. S., 386.
> Sioux City Railroad vs. Chicago Railroad, 117 U. S., 406.

It is conceded by both Courts below that this general rule would be applicable to this case were it not for the decision of this Court in the case of the United States vs. Colton Marble & Lime Co., 146 U. S., 615, and the determination of this controversy largely depends upon a correct

understanding of what was decided in the Colton case.

The land there in question was within the indemnity limits of the grant to the Atlantic and Pacific Railroad under the Act of July 27, 1866, and within the place limits of the grant to the Southern Pacific Railroad Company under the Act of March 3, 1871. It is therefore clear on the very face of it that the case had nothing to do with contemporaneous grants, the grant to the Atlantic and Pacific being five years prior in time to the grant to the Southern Pacific Railroad Company.

Not only were the grants to the two railroads different in point of time, but the only question involved was a discussion of what was meant by the words in the Act of 1871, which provided that the grant to the Southern Pacific Railroad Company should "in no way affect or impair the rights present or prospective of the Atlantic and Pacific Railroad Company," and it was held by this Court that the right of the Atlantic and Pacific to select land within its indemnity limits, in order to make good the losses within its primary limits, was a prospective right and that it was the intention of Congress by the

use of the word "prospective" in the Act of 1871, to limit the grant to the Southern Pacific Railroad Company, so that it would not affect in any way the right of the Atlantic and Pacific Company to select land within its indemnity limits. In other words, the right of the Atlantic and Pacific Company to make indemnity selections was a prospective right which by the very terms of the grant to the Southern Pacific Railroad Company under the Act of 1871, could not be impaired by the subsequent grant to the latter company.

The reasoning in the Colton case would apply to any other railroad company which had acquired rights prior to the passage of the Act of 1871, so that the grant under this act to the Southern Pacific Company would not affect any prospective right which had theretofore been granted, either to the Atlantic and Pacific Company or to any other company. It is not, however, plain how the doctrine of the Colton case can have any application to a railroad company acquiring rights simultaneously with the Southern Pacific Railroad Company and under the same Act of Congress. A careful examination of the decision in the Colton case will show that importance and stress was laid upon the point that the proviso in the Act of 1871

was intended to prevent the Southern Pacific Railroad Company from taking lands "to which any other company had *at the time* a present or prospective right" (United States vs. Colton Marble & Lime Co., 146 U. S., 615, 617); that is to say, it was the intention of Congress that the grant to the Southern Pacific Railroad Company under the Act of 1871, should not affect the rights then in existence of any other railroad company, whether such rights were present or prospective rights.

Now, at the time the grants of land were created under the Act of 1871 the Texas Pacific Railroad Company had no present or prospective right to the land in controversy here. Whatever right it had was created by the Act of 1871 and simultaneously with the right of the Southern Pacific Railroad Company. The two grants were contemporaneous. The limitation of the grant given by this statute was clearly intended to apply to a present or prospective right created in some way by statute or otherwise prior to the Act of 1871, and there is no foundation for the claim that the words "any other railroad company" relate to a railroad company the rights of which were created contemporaneously and by

the same act. When the words "any other railroad company" were used, Congress intended to refer to a railroad company which acquired rights under some prior Act of Congress, and it was never meant that the words "any other railroad company" should include a railroad company which received its rights, both present and prospective, contemporaneously with and at the very moment that the Southern Pacific Railroad Company acquired its own grant under the Act of 1871.

In other words, the single question presented to this Court is, What did Congress mean by the clause "any other railroad company" at the end of Section 23 of the Act of March 3, 1871, which provided that the grant to the Southern Pacific Company should not "affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company?" We insist that these words relate solely to a railroad which had rights acquired prior to the passage of the act. The Southern Pacific Company took its grant subject to the condition that such grant should not interfere with grants theretofore given to other railroads, but not upon the condition that the grant to the Southern Pacific

Railroad Company was to be subordinate to the contemporaneous grant to the Texas Pacific Railroad Company and a departure from and exception to the ordinary rule as to the equal division between grantees of lands falling within the place limits of two grants created by the same Act of Congress. If it had been the intention of Congress to make the grant to the Southern Pacific Company subordinate to the contemporaneous grant to the Texas Pacific Company, surely some words would have been used in the granting act indicating such intention and showing the purpose of Congress to depart from the usual mode of division and distribution of lands given to two grantees by the same Act of Congress.

It is, therefore, respectfully submitted that the Southern Pacific Railroad Company is at least entitled to an equal undivided moiety of the lands common to the place limits of the grants under the Act of Congress of March 3, 1871; that the interest of the Texas Pacific Railroad Company in and its right to said land (if he had any) was forfeited to and resumed by the United States by the Forfeiture Act, approved February 28, 1885; and that by reason of said forfeiture the United States

and the Southern Pacific Railroad Company became tenants in common of said land, and each became entitled to an equal undivided moiety thereof under the doctrine of the decision of this Court in the case of the Southern Pacific Railroad Company vs. The United States, 183 U. S., 519.

THIRD POINT.

If at the time of the forfeiture of its grant the Texas Pacific had any prospective rights in the land forfeited, it was only a right to an undivided moiety in the lands common to the place limits of the two railroads.

The two grants were contemporaneous. Under the settled rule of this Court (referred to at length in the first point of this brief), the Southern Pacific Company upon filing its map of definite location was clearly entitled to all the odd sections within its place limits, in case the Texas Pacific never filed its map of definite location or constructed its road.

The question presented in this case is whether the situation is altered by the proviso in the 23d section of the granting act, and if so, how.

We claim that the proviso refers in no way to

the Texas Pacific Railroad, but if the Court should hold against this contention, it is necessary to ascertain what is meant by the proviso, bearing in mind at the same time that it is contained in an Act of Congress making contemporaneous grants. In other words, so far as the Texas Pacific Company is concerned, the proviso must be construed with reference to the rule dividing between them land given by the same Act to two different railroads.

Now, from the time of the Granting Act of 1871 to the time of the Forfeiture Act of 1885 the Texas Pacific had no present right in the land in question. If it had any right at all thereto (which we deny) it must have been a prospective right and the question comes to this: What prospective right, if any, did the Texas Pacific Railroad have to the lands within the common limits of the two grants?

Having regard to the fact that the grants to the two railroads were simultaneous, it seems to us that the only prospective right which the Texas Pacific could have to the lands within the conflict was the right it might acquire by filing its map of definite location to an undivided half of the common place lands.

If not for the proviso, the Southern Pacific Company was clearly entitled upon filing its map of definite location to all the land within the common place limits, subject to being divested of one-half thereof by the subsequent filing of a map of definite location by the Texas Pacific Company. The right to so divest the Southern Pacific of one-half of the common place lands was therefore the only prospective right which the Texas Pacific had at the date of the forfeiture act.

We, therefore, say that, if we are wrong in the propositions urged in the first and second points of our brief, then the Southern Pacific Company did not by filing its map of definite location gain the title to all the land within its place limits subject to one-half thereof being divested by the subsequent filing of a map of definite location by the Texas Pacific Company, as would be the ordinary case under contemporaneous grant, but that the Southern Pacific Company, when it filed its map of definite location, acquired only a right to an undivided moiety in said lands because of the proviso in the act and the prospective right in the Texas Pacific Company to the other half of said land should it ever file a map of definite location.

We urge that this construction of the act (in case the Court does not agree with us that the proviso in no way relates to the Texas Pacific Company) reconciles the provisions of the proviso with the other controlling fact, viz.: that the act relates to contemporaneous grants.

To put it in another way it is necessary in construing this act not only to consider the proviso, but to give equal consideration to the established rule of contemporaneous grants, and by giving due consideration to both aspects of the matter to harmonize the apparant conflict between them.

We, therefore, submit that if the proviso found in the 23d section of the act of 1871 refers to the Texas Pacific Railroad, and if the Texas Pacific Railroad had any prospective right in the land in controversy at the time of the forfeiture act (all of which we deny), then such prospective right related to an undivided moiety in the common place lands. This prospective right to an undivided moiety was then forfeited to the United States by the Act of 1885, leaving the Southern Pacific Company and the United States tenants in common of the lands within the conflicting place limits of the two grants under the Act of 1871.

MAP No. 2.

LANDS COMMON TO INDEMNITY LIMITS OF S. P. GRANT AND TO PLACE LIMITS OF T. P. GRANT, UNDER ACT OF MARCH 3d, 1871, MARKED IN RED.

ENG'D BY AMERICAN BANK NOTE CO., NEW YORK.

Scale, One Inch — 12 Miles.

FOURTH POINT.

In order to make good losses within its place limits the Southern Pacific Railroad Company is entitled to select from the place lands of the Texas Pacific grant, which have been actually restored to the public domain by the Act of 1885, any lands which are within its own indemnity limits.

The point which we now make is that a railroad is entitled to select indemnity lands from any lands within its indemnity limits which at the time of selection are public lands. The lands covered by this point are shown in red on Map 2.

As we understand it, the case of Ryan vs. Railroad Co., 99 U. S., 382, is on all fours with the case at bar. In the Ryan case the land in controversy was within the indemnity limits of the grant in aid of the California and Oregon Railroad Company under the Act of July 25, 1866 (14 Stat., 239). At the time of the grant to the railroad company the land was not public land, but was claimed to be within the boundaries of a prior Mexican grant. Between the date of the granting act and of the selection of the land

by the railroad, and about a year prior to such selection, this Court held the Mexican grant invalid, and the land was thereby restored to the public domain. It was decided that, whereas the rights of the company under such a grant, in respect to lands within *primary* limits, depend upon the status of the lands, as public lands or otherwise, at the date of the act and the time of definite location, the rights to lands within *indemnity* limits depend upon their status, as public lands or otherwise, at the date of selection.

The Court in the Ryan case especially distinguished it from Newhall vs. Sanger, 92 U. S., 761, where the land restored to the public domain was within the primary or granted limits of the company, and at the time of the grant thereof and its location was affected by an adverse claim, so that the railroad was not capable of taking title thereto. The Court in the Ryan case said at page 388:

> "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally

given failed to meet its requirements. When so selected there was no Mexican or other claim impending over it. It had ceased to be *sub judice* and was no longer in litigation. It was as much 'public land' as any other part of the national domain. The patent gave the same title to the appellee that a like patent for any other public land would have given to any other party. The Mexican claim when condemned lost its vitality. From that time, as regards the future, it ceased to be a factor to be considered, and was in all respects as if it had never existed. In this state of things the appellee acquired its title, and that title is indefeasible."

So in the present case the land within the indemnity limits of the Southern Pacific Grant, which was also embraced within the primary limits of the Texas Pacific Grant, is now, since the Forfeiture Act of 1885 (except so far as the indemnity rights of the Southern Pacific therein are concerned), as much a part of the public domain of the United States as any of the land of the United States. The right of the Southern Pacific to select such lands within its indemnity limits is entirely un-

affected by the past history of that land. It is as if the grant to the Texas Pacific "had never existed." The question is: What is that land now, when selection is sought to be made? Is it now public land or not? If it is now public land, it is of no importance whatever what parties in the past may have had claims or rights thereto, and it would seem absolutely immaterial whether the title to such land had formerly been claimed under a Mexican title thereafter declared void (as in the Ryan case), or under a grant of the United States subsequently declared to be forfeited, as in the case at bar.

In Alabama and Chattanooga R. R. Co., XX. L. D., 408, it appeared that the land in question had been taken under a homestead entry at the time the railroad made application to select the same as within its indemnity limits. The claim under the homestead entry was afterwards relinquished to the United States, "thus leaving the question wholly between the company and the United States" as to whether the railroad was entitled to the land after its restoration to the public domain. Secretary Smith held that:

> "While the selection in question could not properly have been allowed at the time

made by reason of Morton's entry, yet it now appears that such entry never ripened into a patent, but was relinquished to the United States. That being true, I see no reason why the selection may not now be approved."

In Southern Pacific R. R. Co., XXVI. L. D., 452, it was held by Secretary Bliss that:

> "Lands excepted from the grant to the Southern Pacific by homestead entries that were existing at the date when the grant took effect may be taken on behalf of said grant in lieu of mineral lands, if at the date of selection such entries have been canceled, and the lands are free from other claims or rights" (Syllabus).

Since the Ryan case the decisions of the Department of the Interior have been invariably to the effect that the status of lands within indemnity limits at the time of selection determines entirely the right of the railroad thereto.

In Allers vs. Northern Pacific R. R. Co., 9 L. D., 452 (1899), Secretary Noble held that:

> "A tract is not excluded from indemnity selection by reason of its being within the *primary limits* of another grant, if it is in

fact vacant public land at date of selection and otherwise subject to such appropriation."

In Northern Pacific R. R. Co. vs. Halvorson, 10 L. D., 15 (1890), Secretary Noble held that:

> "The right to *select indemnity* is not defeated by the fact that the land is within the *primary limits* of another grant, if the land is excepted from such grant and vacant public land at date of selection."

In Missouri, K. & T. Ry. Co. vs. Beal, 10 L. D., 504 (1890), Secretary Noble held that:

> "Prior to selection, the right to indemnity lands is only a float; and the right acquired by selection is dependent upon the status of the lands at date of selection and not at date of withdrawal."

In Northern Pacific R. R. Co. vs. Moling, 11 L. D., 138 (1890), Secretary Noble held that:

> "The right to select a tract as indemnity under a railroad grant is not defeated by the mere fact that the selection is within the *primary limits* of another grant, if the tract is vacant public land at date of selection."

In Hensley vs. Missouri, K. & T. Ry. Co., 12 L. D., 19 (1891), Secretary Noble held that:

"The right to take a tract of land as indemnity is determined by its status at the date of selection, and not at date of withdrawal."

In Northern Pacific R. R. Co. vs. Bass, 13 L. D., 201 (1891), Acting Secretary Chandler held that:

"The mere fact that a tract is within the *geographical* limits of another grant will not defeat the right to select the same as indemnity, if it is otherwise subject to selection."

In Hastings and Dakota Ry. Co. vs. St. Paul, M. & M. Ry. Co., 13 L. D., 535 (1891), Acting Secretary Chandler held that:

"The right acquired by an indemnity selection is dependent upon the status of the land at date of selection."

In St. Paul, M. & M. R. Co. vs. Munz, 17 L. D., 288 (1893), Secretary Smith held that:

"A tract of land within the *primary limits* of one grant and the *indemnity limits* of another, may be selected by the latter, on proper basis, if excepted from the grant to the former, and free from other claims at date of selection."

In South and North Alabama R. R. Co. vs. Hall, 22 L. D., 273 (1896), Secretary Smith held that:

> "The status of indemnity lands at the date of selection, not definite location of the road, determines the right of the company thereto."

In Southern Pacific Railroad Company vs. McKinley, 22 L. D., 493 (1896), Secretary Smith held that:

> "The right of a railroad company to take a tract of land as indemnity must be determined by the status of such tract at the date of the application to select the same."

It may be said by counsel for the Government that Bardon vs. Northern Pacific Railroad, 145 U. S., 535, is in conflict with the doctrine of the Ryan case. We do not so understand it. In the Bardon case the land in controversy was within the *place* limits of the grant to the Northern Pacific Railroad Company. At the time the railroad took title to its place lands, the land involved was not public land, and was excepted from the grant for the reason that it had been taken up on a pre-emption claim, and the only question before the Court was whether, upon the

restoration to the public domain of lands within the place limits of a railroad grant, which were reserved at the time of the grant, such lands fell within the grant. It was then held that the land in question could not be acquired by the railroad as part of its *place* lands for the reason that it "was severed from the mass of public lands from which the grant to the Northern Pacific Railroad Company could alone be satisfied" by the terms of the granting act, which gave to the railroad for its place limits ten alternate sections of land "not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed." In other words, the Court held that at the time the road of the Northern Pacific was definitely fixed the land involved was pre-empted. It did not, therefore, then fall within the grant of *place* lands, and could not thereafter by reason of the cancellation of the pre-emption claim, because it was too late, the grant of the place lands by its terms only taking effect as of a certain time—viz., when the line of road was definitely fixed, which was prior to the cancellation of the claim.

It was at the same time held that the land so

restored to the public domain could not be taken by the railroad as indemnity land to make up a deficiency within the place limits for the sole reason that such deficiency could only be supplied from land within the limits expressly specified by Congress.

It is hard to conceive that anyone could seriously consider that the Bardon case in any way conflicts with the doctrine of the Ryan case above quoted. It may be that in support of his claim the counsel for the Government will make the following quotation from page 545 of the decision in the Bardon case:

> "Not only does the land once reserved not fall under the grant should the reservation afterwards from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits."

The succeeding sentence gives the reason why such lands could not be taken as a source of indemnity. It is that "*such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress.*" That is to say, all lands which are taken to supply a deficiency in the place limits of a

railroad grant must be taken from the indemnity limits of that grant and from no other lands. The land involved in the Bardon case was not within such indemnity limits, and therefore could not be considered a "source of indemnity."

It would, therefore, seem very clear that this Court did not undertake to decide in the Bardon case that, if the pre-empted land in question had been within the indemnity limits of the Northern Pacific grant, and the pre-emption claim had been canceled subsequent to the granting act, the railroad would not have been entitled to select such land as indemnity land after its restoration to the public domain. The only possible inference from the case is that, if such question had been before it for determination, it would have decided that the railroad was entitled to make such selection, for the sole reason given by the Court why the land after restoration to the public domain could not be taken as indemnity land was that it was not situated within the indemnity limits granted to the railroad company, implying that, if it had been within such indemnity limits, the railroad company would have been entitled to it after it had been restored to the public domain,

although it was not public land at the time of the grant.

The Ryan case has always been referred to with approval by this Court and is now established law. The decisions of the Interior Department have ever since the Ryan case been in accord therewith. We, therefore, respectfully submit that the Southern Pacific is now entitled to select from within the indemnity limits of its grant under the Act of 1871 the lands of the Texas Pacific which were restored to the public domain by the Forfeiture Act of 1885.

FIFTH POINT.

The decree of the Court below should be reversed and modified in so far as it affirmed that part of the decree of the United States Circuit Court for the Southern District of California adjudging that the United States was the owner of the lands described in the first subdivision of said decree.

L. E. PAYSON,
MAXWELL EVARTS,
Of Counsel for Appellants.

APPENDIX.

ACT OF MARCH 3, 1871 (16 UNITED STATES STATUTES AT LARGE, P. 573).

CHAP. CXXII.—*An Act to Incorporate the Texas Pacific Railroad Company, and to Aid in the Construction of its Road, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John C. Fremont, James L. Alcorn, G. M. Dodge, O. C. French, John D. Caldwell, J. J. Noah, A. C. Osborne, Timothy Hurley, C. C. Pool, Silas N. Martin, John M. Corse, George E. Wentworth, Philip H. Morgan, J. D. Cameron, Marshal O. Roberts, James L. Hodges, John Ray, W. Vermilye, Enoch L. Faucher, Charles F. Livermore, Joseph H. Oglesby, John Whytock, Daniel Drew, F. S. Davis, W. Orton, A. C. Babcock, Thomas A. Scott, Samuel D. Hoffman, H. Ramsdale, William H. Jackson, R. C. Parsons, Delos W. Emmons, M. A. Southworth, John H. Hall, G. C. Kinsey, W. P. Clark, James Dart, H. Jacobs, L. T. Smith, W. P. Dole, C. A. Weed, A. P. K. Safford, H. McCullough, Charles Jackson, Elisha Dyer, Alfred Anthony, James Hoy, M. W. Benjamin, H. D. Cooke, Joseph R. West, W. S. Huntington, J. M. Tebbetts, C. C. Leondridge, D. D. Porter, M. Woodhull, Hiram Price, M. C. Hunter, W. T. Walters, J. B. Brownlow, T. A. Morris, Owen Tuller, J. H. Ledlie, R. M. Bishop, Samuel Craighead, D. N. Stanton, Augustus H. Whiting, G. L. Johnston, J. W. Goodland, Powell Clayton,

Samuel Tate, W. Bolton, H. Robinson, George Maney, O. H. Bynum, M. Burns, J. C. Goodloe, E. G. Barney, Cyrus Busey, J. W. Forney, J. Lockwood, E. M. Davis, N. Patton, W. Flanegan, G. O'Brien, G. P. Buel, G. H. Gidding, J. J. Newell, E. W. Rice, R. M. Shoemaker, Samuel Sloan, S. W. Morton, J. B. Bowman, L. M. Flournoy, J. J. Hinds, G. R. Weeks, J. T. Ludling, B. C. Gilbert, B. D. Williams, Thomas Olcott, G. A. Fosdick, Harry Hays, P. S. Forbes, John T Sprague, L. R. Marsh, A. W. Beckwith, J. C. Stanton, Cyrus H. Baldwin, A. J. Hamilton, Rush R. Sloan, Silas C. Colgrove, Samuel D. Jones, N. H. Decker, William N. Leet, B. F. Allen, J. B. Chaves, Augustus Kountze, John N. Goodwin, William S. Rosecrans, Michael Hahn, H. C. Warmouth, J. S. Williams, G. M. Spencer, L. J. Higby, W. C. Kimball, and all such persons as shall or may be associated with them, and their successors, are hereby created a body politic and corporate in fact and in law, by the name, style, and title of the Texas Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, State of Texas; thence by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California, to ship's channel, in the bay of San Diego, in the State of California, pursuing in the location thereof, as near as may be, the thirty-second

parallel of north latitude, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the pur[po]ses of this act.

Sec. 2. That the persons named in the first section of this act shall constitute a board of commissioners, (twenty of whom shall constitute a quorum for the transaction of business), to be known as the Texas Pacific Railroad Commissioners, who shall meet in the City of New York within ninety days after the passage of this act, at a time to be designated in a notice to be signed by the person first named in the list of corporators and six of his associates, and to be published for two weeks in, at least, one daily newspaper in New York, New Orleans, and Washington; and, when so met, they may cause books to be opened for the subscription of the capital stock of said company, and when twenty thousand shares, amounting to two millions of dollars, shall have been subscribed, and ten per centum actually paid thereon, in money, to the treasurer, to be elected by said commissioners, who shall give bond for its safekeeping and payment to the treasurer of the company when organized, then it shall be lawful for such subscribers or stockholders, or a majority thereof, to organize said company in accordance with the provisions of this act, and to elect not less than seven, nor more than seventeen directors, a majority of whom shall be necessary to the transaction of business, and who shall hold their offices for one year and until their successors shall be elected and qualified; and the said directors shall immediately proceed to elect a president, vice-president, secretary, and treasurer; the president and vice-president shall be directors. At all elections for directors, each share of stock shall be entitled to one vote, which may be given by the holders in person, or by proxy, who shall also be a shareholder. The directors shall hold their offices for any term not exceeding three years, as may be provided in the by-laws; and the annual meetings of stockholders shall take place as provided for in said by-laws.

SEC. 3. That the capital stock of the Texas Pacific Railroad Company shall be fixed by the board of directors, at a sum not exceeding fifty millions of dollars, in shares of one hundred dollars; and when the amount is so fixed, it shall never be increased except by consent of Congress. Assessments upon said stock shall only be made by a majority vote of the whole number of directors at a regular meeting, which said assessments shall be paid at the expiration of thirty days after a notice given in one newspaper in each of the cities of Washington, Philadelphia, New York, and New Orleans.

SEC. 4. That the said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by congressional, State, or territorial authority, on the route prescribed in the first section of this act; but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean.

SEC. 5. That the said company shall have power and authority to make running arrangements with any railroad company or companies heretofore chartered, or that may hereafter be chartered by congressional, State, or territorial authority; also to purchase lands, or to accept donations, or grant of lands, or other property, from States or individuals, for the purpose of aiding in carrying out the object of this company.

SEC. 6. That the rights, lands, land grants, franchises, privileges, and appurtenances, and property of every description, belonging to each of the consolidated or purchased railroad company or companies, as herein provided, shall vest in and become absolutely the property of the Texas Pacific Railroad Company: *Provided*, That in all contracts made and entered into by said company with any and all other railroad company or companies, to perfect such aforesaid consolidation or purchase, the indebtedness or other legal obligations of said company or

companies shall be assumed by the said Texas Pacific Railroad Company as may be agreed upon, and no such consolidation or purchase shall impair any lien which may exist on any of the railroads so consolidated or purchased; but said company shall not assume the debts or obligations of any company with which it may consolidate or purchase as aforesaid, to an amount greater than the cash value of the assets received from the same.

SEC. 7. That the said Texas Pacific Railroad Company shall have power to make and enforce rules and by-laws for the election of its officers, and the government and management of the business of the company, and to do and perform all needful and proper things to be done and performed to promote the objects of the company hereby incorporated, not inconsistent with the laws of the United States and the provisions of this charter.

SEC. 8. That the right of way through the public lands be, and the same is hereby, granted to the said company for the construction of the said railroad and telegraph line, and the right, power, and authority is hereby given to said company to take, from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands; and there is also hereby granted to said company grounds for stations, buildings, workshops, wharves, switches, side-tracks, turn-tables, water-stations, and such other structures as may be necessary for said railroad, not exceeding forty acres of land at any one point.

SEC. 9. That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such

line may be adopted by said company, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have, *not have* been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad may be selected as above provided; and the word "mineral," where it occurs in this act, shall not be held to include iron or coal: *Provided, however*, That no public lands are hereby granted within the State of California further than twenty miles on each side of said road, except to make up deficiences as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term "ship's channel," as used in this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego bay than it may acquire by gift, grant, purchase, or otherwise, except the right of way, as herein granted: *And provided further*, That all such lands, so granted by this section to said company, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an

average of two dollars and fifty cents per acre for all the lands herein granted.

SEC. 10. That when the route of said railroad and telegraph line shall pass through the lands of private persons, or where it may be necessary for said railroad company to take any lands belonging to private persons for any of the purposes herein mentioned necessary to said road, such right of way through or title to such lands shall be secured in accordance with the laws of the State or Territory in which they may be situated.

SEC. 11. That the Texas Pacific Railroad Company shall have power and authority to issue two kinds of bonds, secured by mortgage, namely: first, construction bonds; second, land bonds. Construction bonds shall be secured by mortgage, first, on all or any portion of the franchises, road-bed, or track of said railroad, and all the appurtenances thereto belonging, when constructed or in the course of construction, from a point at or near Marshall, to ship's channel, in the bay of San Diego, in the State of California, as aforesaid. Land bonds shall be secured by mortgage, first, on all or any portion of the lands hereby granted in aid of the construction of said railroad as is provided for in this act; second, on lands acquired by any arrangement or purchase or terms of consolidation with any railroad company or companies to whom grants of lands may have been made, or may hereafter be made, by any congressional, State, or territorial authority, or who may have purchased the same previous to any such arrangement or consolidation: *Provided*, That all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be a sufficient evidence of their legal execution, and shall confer all the rights and property of said company as therein expressed: *And provided also*, That the proceeds of the sales of the aforesaid construction and land bonds shall be applied only in the construction, operation, and equipment of the contemplated railroad line: *And provided further*, That said mortgage shall in

no wise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation.

SEC. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad and put it in running order as a first-class road in all its appointments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and coterminous with said completed road to which it shall be entitled for each section so completed. Said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from pre-emption, private entry, and sale: *Provided, however*, That the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, "An Act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, and the amendments thereto, shall be, and the same are hereby, extended to all other lands of the United States on the line of said road when surveyed, except those hereby granted to said company.

SEC. 13. That the president of the company shall annually, by the first day of July, make a report and file it with the Secretary of the Interior, which report shall be under oath, exhibiting the financial situation of the company, the amount of money received and expended, and the number of miles of road constructed each year; and further, the names and residences of the stockholders, of the directors, and of all other officers of the company, the amount of stock subscribed, and the amount thereof

actually paid in, a description of the lines of road surveyed and fixed upon for construction, the amount received from passengers and for freight, respectively, on the road, a statement of the expenses of said road and its fixtures, and a true statement of the indebtedness of said company and the various kinds thereof.

SEC. 14. That the certificates of the capital stock must be signed by the president and secretary, and attested by the seal of the company, and shall contain an extract from the proceedings of the board of directors fixing the amount thereof, as well as from this act, authorizing such issue. All the bonds and mortgages issued by said company must be signed by the president and secretary, and attested by the seal of said company, and shall contain an extract from the law authorizing them to be issued. The face value of said bonds shall be one thousand dollars in gold, and shall be redeemable at such times, and to bear such rate of interest, payable semi-annually in gold, as may be determined by the directors. The total value of the construction bonds to be issued shall not exceed thirty thousand dollars per mile of said railroad, and the total face value of the land bonds shall not exceed two dollars and fifty cents per acre for all lands mortgaged; the total amount of each to be determined by the board of directors.

SEC. 15. That all railroads constructed, or that may be hereafter constructed, to intersect said Texas Pacific railroad, shall have a right to connect with that line; that no discrimination as regards charges for freight or passengers, or in any other matter, shall be made by said Texas Pacific Railroad Company against any of the said connecting roads; but that the same charges per mile as to passengers, and per ton per mile as to freight, passing from the said Texas Pacific railroad over any of said connecting roads, or passing from any of said connecting roads over any part of said Texas Pacific railroad, shall be made by said company as they make for freight and passengers over their own road: *Provided also*, That

said connecting roads shall reciprocate said right of connection and equality of charges with said Texas Pacific railroad: *And provided further*, That the rates charged for carrying passengers and freight, per mile, shall not exceed the prices which may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific railroads.

SEC. 16. That said road shall be constructed of iron or steel rails manufactured from American ore, except such as may have heretofore been contracted for by any railroad company which may be purchased or consolidated with by the company hereby incorporated, as provided by this act.

SEC. 17. That the said Texas Pacific Railroad Company shall commence the construction of its road simultaneously at San Diego, in the State of California, and from a point at or near Marshall, Texas, as hereinbefore described, and so prosecute the same as to have at least fifty consecutive miles of railroad from each of said points complete and in running order within two years after the passage of this act; and to so continue to construct each year thereafter a sufficient number of miles to secure the completion of the whole line from the aforesaid point on the eastern boundary of the State of Texas to the bay of San Diego, in the State of California, as aforesaid within ten years after the passage of this act; and upon failure to so complete it, Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion.

SEC. 18. That the President of the United States, upon the completion of the first section of twenty miles, shall appoint one commissioner, whose duty it shall be to examine the various sections of twenty miles as they shall be completed, and report thereon to him in writing; and if, from such report, he be satisfied that said company has fully completed each section of its road, as in this act provided, he shall direct the Secretary of the Interior to issue patents to said company for the lands it

is entitled to under this act, as fast as each section of said road is completed.

SEC. 19. That the Texas Pacific Railroad Company shall be, and it is hereby, declared to be a military and post road; and for the purpose of insuring the carrying the mails, troops, munitions of war, supplies and stores of the United States, no act of the company, nor any law of any State or Territory, shall impede, delay or prevent the said company from performing its obligations to the United States in that regard; *Provided*, That said road shall be subject to the use of the United States for postal, military, and all other governmental services, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the government shall at all times have the preference in the use of the same for the purpose aforesaid.

SEC. 20. That it shall not be lawful for any of the directors, either in their individual capacity or as members of an incorporated or joint stock company, to make any contracts or agreements with the Texas Pacific Railroad Company for the construction, equipment, or running of its road, or to have any interest therein; and all such contracts or agreements are hereby declared null and void, and all money or property received under such contracts or agreements may be recovered back for the benefit of the company by any stockholder.

SEC. 21. That any railroad company whose route lies across the route of the Texas Pacific railroad, may cross the same, and for the purpose of crossing shall have the right to acquire at the double minimum price all lands, whether of the United States or granted by this act, which shall be needed for a right of way two hundred feet wide through said lands, and for depots, stations, side-tracks, and other needful purposes, not exceeding for such purposes forty acres at any one station.

SEC. 22. That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the state of

Louisiana, shall have the right to connect by the most eligible route to be selected by said company with the said Texas Pacific railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company, within said State of California: *Provided*, That said company shall complete the whole of said road within five years from the passage of this act.

SEC. 23. That, for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.

Approved, March 3, 1871.

SECTION 3 OF THE ATLANTIC AND PACIFIC ACT (14 UNITED STATES STATUTES AT LARGE, P. 292).

Sec. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said Railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd members, not more than ten miles beyond the limits of said alternate sections and not including reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land

may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultual lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided, further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific Railroad.

SECTION 18, OF THE ATLANTIC AND PACIFIC ACT (14 UNITED STATES STATUTES AT LARGE, P. 292).

SEC. 18. *And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such points, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.*

FORFEITURE ACT OF FEBRUARY 28, 1885.

CHAP. 265.—*An act to declare a forfeiture of lands granted to the Texas Pacific Railroad Company, and for other purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands granted to the Texas Pacific Railroad Company under the act of Congress entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy one, and acts amendatory thereof or supplemental thereto, be, and they are hereby, declared forfeited, and the whole of said lands restored to the public domain and made subject to disposal under the general laws of the United States, as though said grant had never been made: *Provided*, That the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even section within said grant.

SEC. 2. That the act of March third, eighteen hundred and seventy-five, entitled "An act for the relief of settlers within railroad limits," is hereby repealed.

Approved, February 28, 1885.

JOINT RESOLUTION CONCERNING THE SOUTHERN PACIFIC RAILROAD OF CALIFORNIA (16 UNITED STATES STATUTES AT LARGE, P. 382).

Be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-

seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the Commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.

Approved, June 28, 1870.

and abandoning their proposed raid turned back and brought him safely to his friends and tribe, where he fully recovered and lived for many years. A few years after his return he made several shields, as directed by the *taíme*, one of which still exists in possession of Dr J. D. Glennan, U. S. A., now stationed at Fort Clark, Texas; he also made the sacred *ä'poto*, which he carried for some time in the annual sun dance, and afterward bestowed it upon his son (i. e., nephew) K'a-yä'ñti, who still lives, now an old man. Koñáte subsequently assumed the name of Pá-tadal, "Lean-bull," which he conferred later on its present owner, commonly known to the whites as Poor-buffalo.

Captain Pope, who visited the Hueco tanks in 1854, describes the peculiar formation of the cave springs and mentions the Gúadalóñte fight of some years before, his statements being evidently derived from the Mexicans, who were disposed to magnify their own part in the affair. He says:

> Besides the water contained in the tanks there are numerous holes and crevices in the mountains, which contain sufficient for every purpose to last for a considerable time. It is proper to remark that animals can not drink from the tanks; the water is taken out in buckets and thrown down the rocks until all have been supplied. Thus watering is a matter of time and labor. The peculiar formation of these mountains, their innumerable caverns and hiding places, seem to have been intended for a refuge for the Indians; nor have they neglected to avail themselves of its advantages. In one instance, however, they "reckoned without their host." About fourteen years ago these Arabs of New Mexico, the Apaches, having made a desperate foray upon the Mexicans, retreated with their plunder to these mountains. The Mexicans surprised and surrounded them, hemming them up in the rocky ravine forming the eastern tank. Here an engagement took place, in which the Indians were totally defeated and nearly exterminated, only two or three escaping. It is said that upward of one hundred of them were killed (*Pacific Railroad, 1*).

FIG. 122—Winter 1857-58—Horses stolen.

WINTER 1857-58

The Kiowa camped this winter on Two-butte creek (*Ä'zót P'a*, "Driftwood creek"), a southern tributary of the Arkansas, below Bent's Fort in Colorado. A band of Pawnee came on foot and stole six bunches of horses, including all those of T'ébodal and Set-ängya; among them were three spotted mules. The Kiowa pursued the thieves for three days and came in sight of them at sunset; they intended to strike them next morning and get the stock, but that night a snowstorm came on and stopped the pursuit; however, they killed one Pawnee who had been crippled by the cold. The figure above the winter mark represents the stolen horses.

SUMMER 1858

Ädo-byúñi K'ádó, "Timber-circle sun dance." This dance was held on lower Mule creek, entering the Salt fork of the Arkansas from the

north, near the mouth of Medicine-lodge creek; it was so called because held in a natural circular opening in the timber, as indicated in the figure representing a circle of trees around the medicine lodge.

FIG. 123—Summer 1858—Timber-circle sun dance.

WINTER 1858-59

Gúi-k'áte Ehótal-de Sai, "Winter that Wolf-lying-down was killed." The figure above the winter mark represents a man shot through the body, his name being indicated by the connected figure overhead.

After the last sun dance, the Kiowa warriors made a great raid into Chihuahua and captured a number of horses. They had recrossed the Rio Grande and camped on the northern side, when they were attacked at sunrise by a pursuing party of Mexicans. The Indians fled and escaped, excepting Gúi-k'áte, "Wolf-lying-down," who rode a mare which was delayed by a colt in following, and was therefore unable to get away from the enemy, who shot and killed him.

FIG. 124—Winter 1858-59—Gúi-k'áte killed.

Set-t'aiñte and Set-imkía also went against the Ute this fall and found and attacked a single tipi on the upper South Canadian, killing one man and wounding several others.

SUMMER 1859

Ahíñ-dóha K'ádó, "Cedar-bluff sun dance." The figure at the side of the medicine lodge is intended to represent a cedar tree on a bluff.

FIG. 125—Summer 1859—Cedar-bluff sun dance.

This dance was held at a place known to the Kiowa as "Cedar bluff," on the northern side of Smoky-hill river (*Pe P'a*, "Sand river"), about opposite the mouth of Timber creek, near the present Fort Hays, Kansas. The Kiowa state that they went so far north on account of the abundance of buffalo in that vicinity. This dance is sometimes also called *Ăä'otón-de K'ádó*, "Timber-clearing sun dance," from the fact that most of the trees once there had been cut down.

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